IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 564 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KALUBHAI BHULABHAI PATEL

Versus

BHEMABHAI BHULABHAI PATEL

Appearance:

1. First Appeal No. 564 of 1985

MR FIROZ H PATHAN for MR MUKUND M DESAI for Petitioner No. 1-2

MR DHAVAL BAROT for MR DF AMIN for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE M.S.SHAH

Date of decision: 24/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This appeal under Section 96 of the Code of Civil

Procedure, 1908 is directed against the judgment and decree dated 7.11.1984 passed by the learned Civil Judge (Senior Division), Godhra in Special Civil Suit No. 74 of 1982, by which the learned trial Judge held that respondent-plaintiff Bhemabhai Bhulabhai Patel is entitled to get the one-third share in the ancestral properties, being lands bearing Survey Nos. 63, 69, 224, 38 of village Vavia Muvada, the lands out of Survey Nos. 120 and 121 of village Moti Kharsoli and the two houses bearing Nos. 52 and 63 situate at village Vavia Muvada. All these properties are situated in Santrampur taluka which was formerly in Panch Mahals District and now is stated to be in reconstituted Dahod District. The learned trial Judge also issued certain consequential directions. Aggrieved by the aforesaid judgment and decree, the original defendants filed the present appeal. We are informed that when the appeal came to be admitted, this Court granted interim stay against drawing up of final decree, which order was passed on 21.1.1985.

2. The facts leading to filing of the present appeal, briefly stated, are as under :-

2.1 The respondent-plaintiff (hereinafter referred to as "the plaintiff") and the appellants (hereinafter referred to as "the defendants") are true brothers and are residing in village Vavia Muvada of Santrampur taluka. The parties are agriculturists. The plaintiff is a blind person. According to the plaintiff, the plaintiff, the defendants and their mother are residing together as undivided Hindu family and all their properties situate in village Vavia Muvada including agricultural lands, houses and the well and engine are ancestral properties; so also the properties of the parties in village Moti Kharsoli are joint family properties. According to the plaintiff, defendant No.1, being eldest brother, was managing the family properties and had also opened a bank account in his personal name and deposited the amounts from the sale of crops in the said bank account. Since Bhulabhai, father of the parties, had expired in the year 1949 i.e. before the enactment of the Hindu Succession Act, 1956 leaving behind him the three sons i.e. the plaintiff and the two defendants herein, only the said three sons inherited the properties of their father Bhulabhai and, therefore, their sisters who were already married and residing with their respective husbands were not entitled to any share in the said properties nor any right to maintenance therefrom. As far as the widow of Bhulabhai (mother of the parties) is concerned, the plaintiff contended that she was residing with the plaintiff and the defendants

and, therefore, she was not required to be paid any maintenance amount as such. The plaintiff claimed one-third share in the aforesaid undivided joint family properties. The plaintiff filed the present suit in the year 1976 as an indigent person. It appears that permission to sue as an indigent person was granted and the suit was ultimately numbered as Special Civil Suit No. 74 of 1982.

2.2 The defendants i.e. the two brothers, who were served, appeared in the suit and contested the plaintiff's claim contending that all the suit properties are of the ownership of defendant Nos. 1 and 2, and that the suit properties are not ancestral properties as alleged by the plaintiff. The original land was jagirdari land. After abolition of the Jagirdari Act, defendant Nos. 1 and 2 acquired the land as tenants. The defendants had thus purchased their right and interest in the properties. As far as the land purchased from Bai Jamini is concerned, defendant No. 1-Kalubhai purchased the land from Bai Jamini and accordingly he became the owner of the said property. However, according to defendant No. 1, in the year 1972, their mother asked defendant No. 1 to enter the plaintiff's name in the revenue record in order to show some property in the plaintiff's name so that the plaintiff would have some prospects of getting married and for this reason defendant No. 1 had got the plaintiff's name entered in the revenue record, but according to the defendants, the plaintiff did not have any legal right in the said properties and, therefore, he had no right to ask for partition of the said properties which were of the ownership of defendant Nos. 1 and 2.

2.3 After considering the documentary and oral evidence on record, the learned trial Judge held that the plaintiff had proved that the suit properties are joint family properties except the amount of Rs.27,000/- lying in the Urban Co-Operative Bank Ltd. which was held to be of the ownership of defendant No.1. The learned trial Judge further held that the plaintiff had proved that he has got one-third share in the undivided suit properties except the amount lying in the aforesaid bank account. The learned trial Judge negatived the defendants' contention that the suit was not maintainable for non-joinder of the mother and sisters as parties to the suit because Bhulabhai, father of the plaintiff and the defendants, had expired in the year 1949 before the enactment of the Hindu Succession Act, 1956 and that the sisters who were already married and residing at their respective husband's place since last 40 years had no

right of maintenance in the suit properties. So also the mother was residing with the plaintiff and the defendants in the said house and, therefore, she was also not entitled to any separate maintenance.

3. At the hearing of this appeal, Mr Firoz H Pathan for Mr MM Desai, learned counsel for the appellants has reiterated the same contentions before us which were raised on their behalf before the trial Court.

4. On the other hand, Mr Dhaval Barot for Mr DF Amin, learned counsel for the respondent-original plaintiff has supported the judgment of the trial Court and has vehemently submitted that no ground is made out to disturb the findings given by the learned trial Judge.

5. As far as the contention about non-maintainability of the suit is concerned, admittedly Bhulabhai, father of the parties (who are all brothers), expired in the year 1949 i.e. long prior to coming into force of the Hindu Succession Act, 1956. The three daughters of Bhulabhai were already married during the life time of Bhulabhai and at the time of his death were residing at their respective husband's place and, therefore, the trial Court rightly held that they were not entitled to any maintenance out of the joint family properties. As far as the widow of Bhulabhai is concerned, apart from the fact that she was residing with the plaintiff and the defendants in the same house, we are not required to go into the question about any claim for separate maintenance for her because it is brought to our notice that the widow of Bhulabhai, i.e. the mother of the parties herein, has already expired during pendency of the appeal and, therefore, we are not inclined to go into that academic controversy at this stage. For the aforesaid reasons, we are not inclined to disturb the finding given by the learned trial Judge that the suit is maintainable.

6. Coming to the principal controversy raised in this appeal as to whether the six lands in question are joint family properties or are the self acquired properties of the defendants, the trial Court has elaborately discussed the documentary evidence on record. Land record entry Nos. 22, 28, 207 and other mutation entries clearly show the name of the plaintiff admittedly since 1972. The plaintiff's case is that the plaintiff's name was earlier not entered in the revenue record because when the jagidari lands were shown to be of the ownership of the defendants, the plaintiff was a minor and, therefore, his name was not entered in the revenue

record. The trial Court has accepted the said case of the plaintiff. When the plaintiff's name was admittedly mutated in the revenue record from 1972 onwards and the defendants have admitted this fact, the defendants would obviously be estopped from challenging the plaintiff's right in the said suit lands.

7. As regards the land alleged to have been purchased by defendant No. 1 from Bai Jamini for Rs.700/-, even, according to the defendants, it was an oral sale deed and for this purpose reliance was placed on mutation entry No. 28. However, apart from the fact that no document is produced by the defendants in support of their claim of alleged purchase from Bai Jamini, the defendants' case is destroyed and the plaintiff's case is borne out by the document at Exh. 34 which shows that on 7.6.1926 it was Bhulabhai Kuberbhai, father of the plaintiff and the defendants, who purchased the land in question from Bai Jamini. In fact, Bai Jamini was the wife of Kanabhai Kuberbhai, who was the real brother of Bhulabhai Kuberbhai. Even the defendants did not challenge the authenticity of the said document. In fact, it was the defendants' case that the document was originally in their custody and was subsequently taken away by the plaintiff and produced before the Court. Similarly, the trial Court has referred to mutation Entry Nos. 18 and 29 regarding the land bearing Survey Nos. 120 and 121 purchased from Dashrathsingh wherein also the plaintiff's name is entered as a co-owner.

8. In view of the above documentary evidence, we see no reason to interfere with the finding given by the trial Court that the suit lands which are all agricultural lands are ancestral properties and each of the parties will get one-third share in the said ancestral properties so also in the two houses constructed on the said lands.

10. As regards the amount lying in the Urban Co-Operative Bank Ltd., admittedly the said amount is in the name of defendant No.1 and the trial Court has already held that the amount lying therein is of the exclusive ownership of defendant No. 1. There are no cross objections filed by the respondent-plaintiff and, therefore, we are not required to dilate on this aspect any further.

11. In view of the above discussion, we find no infirmity in the judgment of the trial Court holding that the land bearing Survey Nos. 63, 69, 224, 38 of village Vavia Muvada and the land out of Survey Nos. 120 and 121

of village Moti Kharsoli and the two houses bearing Nos. 52 and 63 situate at village Vavia Muvada are ancestral properties and that the plaintiff is entitled to get one-third share in all the said properties.

12. At this stage, Mr Dhaval Barot for Mr DF Amin for the respondent-plaintiff states that although the land bearing Survey No. 38 in village Vavia Muvada was shown to be ancestral property covered by the operative order in the judgment of the trial Court, by inadvertent mistake it was not shown in the preliminary decree which is challenged in the present appeal.

If that be so, it would be open to the plaintiff to make an application before the trial Court under Section 152 of the Code of Civil Procedure, 1908 for correction of the decree. As and when such an application is made by the plaintiff, the trial Court shall deal with the same in accordance with law with utmost expedition and thereafter proceed for drawing up of the final decree.

13. Subject to the aforesaid direction, the appeal is dismissed. In the facts and circumstances of the case and considering the relationship between the parties, there shall be no order as to costs.

(N.G. Nandi, J.)

(M.S. Shah, J.)
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